In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1450

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 474 F. 2d 81. The opinion of the district court (Pet. App. A) is reported at 332 F. Supp. 655.

JURISDICTION

The judgment of the court of appeals was entered on February 1, 1973. The petition for a writ of certiorari was filed on April 25, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court's findings of unlawful *de jure* racial segregation in the Indianapolis public

schools were properly upheld by the court of appeals as not clearly erroneous.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Fourteenth Amendment to the Constitution of the United States and of Section 407 of the Civil Rights Act of 1964, 42 U.S.C. 2000c-6, are set forth at Pet. App. C.

STATEMENT

The United States instituted this school desegregation suit in the United States District Court for the Southern District of Indiana pursuant to Section 407 of the Civil Rights Act of 1964, 42 U.S.C. 2000c-6.[1] On August 5, 1968, the district court, on the basis of stipulations agreed to by all parties (Pet. App. B, A55-A56), found unlawful racial discrimination in petitioners' faculty assignments and entered a preliminary injunction ordering them to take specific measures designed to desegregate the public school faculties. After lengthy trial proceedings, the district court (Pet. App. A) further found unlawful racial discrimination in the assignment of students, enjoined further racial discrimination in the operation of the Indianapolis public school system, and ordered petitioners to take specified action "to fulfill their affirmative duty to achieve a nondiscriminatory school

[1]Review in this Court has also been sought with respect to several other aspects of this litigation. See *School Town of Speedway* v. *Dillin*, certiorari denied, 407 U.S. 920; *Citizens of Indianapolis for Quality Schools* v. *United States*, No. 72-710, certiorari denied January 22, 1973; *Metropolitan School District of Lawrence Township* v. *Dillin*, No. 72-1377, petition for a writ of certiorari pending; *Sendak* v. *Dillin*, No. 72-1418, petition for a writ of certiorari pending.

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system" (Pet. App. A, A44).[2] The court of appeals affirmed (Pet. App. B).

The district court set forth at length the reasoning supporting its finding of unlawful school segregation. The court first determined (Pet. App. A, A16-A19) that the petitioners had been implementing a deliberate policy of racial segregation on May 17, 1954, the date of this Court's decision in *Brown* v. *Board of Education,* 347 U.S. 483. Until September 1949, petitioners openly and officially operated a racially segregated dual school system under a state law specifically authorizing such systems (Pet. App. A, A14-A15). The Indianapolis dual school system was characterized by complete racial segregation of students at the high school level and of faculties and staffs for schools of all grade levels, and by substantial segregation of students at lower levels (Pet. App. A, A17). In 1949, the state statute permitting dual school systems was repealed. Following repeal of the authorizing statute, petitioners nevertheless continued to promote and effectuate substantial racial segregation (Pet. App. A, A17-A18). Consequently, in 1954 the Indianapolis schools were "still segregated by operation of law, by virtue of the acts and omissions of the [petitioner School] Board done is defiance of the new requirements of Indiana law" (Pet. App. A, A19).[3] The district court further

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[2]The district court stated that certain further legal questions should be resolved prior to entry of a final desegregation order (Pet. App. A, A40-A43). These issues remain to be litigated in proceedings scheduled to commence in the district court on June 11, 1973.

[3]As of the 1954-1955 school year, each of the 12 elementary schools designated as "colored schools" in 1948 was still more than 97.5 percent black, and the single "colored" high school remained 100 percent black.

found (Pet. App. A, A19-A25) that petitioners, by failing to desegregate the all-black schools existing in 1954 and by discriminatorily contributing to the establishment or maintenance of racial segregation at other schools since 1954, had continued to operate an unconstitutional system of student assignment from 1954 to the date of trial.[4]

The district court's general finding that petitioners had continued unlawful school segregation from before 1949 to the date of trial was based upon separate specific findings with respect to the deliberate fostering of racial segregation through gerrymandered attendance zones (Pet. App. A, A18-A20, A24), student transfer policies and practices (Pet. App. A, A18), the use of optional attendance zones in racially mixed residential areas (Pet. App. A, A17-A18, A21-A22), the pattern of new school construction (Pet. App. A, A22-A23), the bussing of students to maintain segregation (Pet. App. A, A18, A21, A23), the maintenance of segregation in special education classes in elementary schools (Pet. App. A, A23-A24), the use of portable classrooms and other facilities to forestall desegregation (Pet. App. A, A20-A21), and the assignment of faculty according to race (Pet. App. A, A19, A21, A25).

ARGUMENT

Petitioners challenge the district court's finding of unlawful segregation, apparently contending that the school segregation in Indianapolis in 1954 was merely *de facto* and not *de jure* and that the finding of acts and omissions implementing continued segregation after 1954 was clearly erroneous.

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[4]Petitioners conceded that their system of faculty and staff assignment had been segregated during this period. See p. 2, *supra*.

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1. Petitioners' contention that the 1954 school segregation in Indianapolis was merely *de facto* segregation apparently rests primarily on the mistaken premise that only completely segregated dual school systems constituted *de jure* segregation in 1954. In *Brown* v. *Board of Education, supra,* this Court held that state-imposed racial separation in the public schools denies black students equal protection of the laws. This holding applies not only where the state-imposed racial separation was complete but also where it was, as in Indianapolis, intentional, substantial, and continuous. See, *e.g., United States* v. *Board of Education,* 429 F. 2d 1253 (C.A. 10); *Davis* v. *School District of City of Pontiac,* 309 F. Supp. 734 (E.D. Mich.), affirmed, 443 F. 2d 573 (C.A. 6). The district court, contrary to petitioners' claim, was not applying a purely remedial standard or merely determining that petitioners had failed to eliminate school segregation; the court explicitly found that petitioners had affirmatively imposed and promoted racial segregation in the Indianapolis public schools. In affirming this finding, the court of appeals properly distinguished cases involving racial separation not caused or promoted by state action.

2. The district court's findings of *de jure* segregation in 1954 and of acts and omissions of petitioners designed to perpetuate such segregation thereafter were supported by substantial evidence contained throughout a voluminous record embracing more than 190 exhibits and a transcript of more than 2000 pages (Pet. App. B, A53). The court of appeals properly affirmed these findings as not clearly erroneous and this evidentiary question warrants no further review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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